THE LEGAL LEGISLATIVE AND ECONOMIC BATTLE OVER RAILROAD RATES

FOR nearly fifty years railroad rates have been a prolific source of trouble in the courts, in the state legislatures and in the workings of economic forces. Apparently we have reached a point where the legal battle is nearly over. The problem has shifted to Congress, where economic forces, pressing on the farmers, manufacturers and shippers generally are forcing some kind of change.

The legal battle, long drawn out, is now closing for lack of argument. The opening of this trouble was a reduction of rates by the different states and not by Congress. Since then there has been a bewildering maze of litigation. When the panic of 1873 burst the bubble of inflated values and credit, due to the Civil War and European financing of American railroads, prices declined rapidly, and wheat, corn, hogs and cattle in the Mississippi Valley netted little to the farmer after paying freight rates, and so the western legislatures enacted "Granger Laws" reducing railroad rates. In 1876 the Supreme Court sustained those reductions.[1]

Ten years later, in 1886, in the Wabash case, the state power to reduce rates was cut down by a decision of the Supreme Court that a state has no control over rates beyond the borders of the state; in other words, that a state may reduce intrastate rates, but not interstate rates.[2]

Meantime the decisions in the Granger Cases did not go unchallenged. While the original American Constitution of 1787 did not contain the words "law of the land" from Magna Charta of 1215, nor the words "due process of law" from enactments in the next century in the reign of Edward III, yet the Fifth Amendment of 1791 to the American Constitution remedied this omission

[1] Munn *v.* Illinois, 94 U. S. 113 (1876); Chicago, B. & Q. R. R. *v.* Iowa, 94 U. S. 155 (1876); Peik *v.* Chicago, etc. Ry., 94 U. S. 164 (1876); Chicago, M. & St. Paul R. R. *v.* Ackley, 94 U. S. 179 (1876); Winona, etc. R. R. *v.* Blake, 94 U. S. 180 (1876); Stone *v.* Wisconsin, 94 U. S. 181 (1876). Munn *v.* Illinois involved grain elevator charges under an Illinois statute of 1871, but the other cases involved railroad rates under statutes enacted in 1874. The Winona decision referred to above probably involved the Minnesota Law of March 6, 1874 (MINN. GEN. L. 1874, ch. 26).

[2] Wabash, etc. Ry. Co. *v.* Illinois, 118 U. S. 557 (1886).

and provided that no person shall "be deprived of . . . property, without due process of law." That Amendment applied, however, only to the federal government, and it was not until 1868 that it was applied to the states by the Fourteenth Amendment. At first the Supreme Court was not inclined to hold that this Amendment had any application to a state statute reducing rates. In the Granger Cases in 1876, mentioned above, the court declined to make that application. The bar, however, continued to insist that the Amendment did give to the courts the power to set aside a confiscatory rate imposed by state statute or commission. Finally, in 1886, (the same year as the Wabash decision mentioned above) the court intimated that a confiscatory rate might be unconstitutional.[3] Four years after that, in 1890 the court set aside a reduction of rates by a state commission as a violation of the Fourteenth Amendment.[4]

Immediately the question arose — how can a railroad prove that the reduced rate is confiscatory; what elements make up the value of the railroad; what is a fair income on that value; in short, what is "a reasonable rate" in a case of alleged confiscation? On that last short question there have been hundreds of lawsuits waged; thousands of lawyers engaged; millions of money expended. The Supreme Court has studiously refrained from foreclosing itself by a definite answer to this question, just as all courts refrain from defining fraud, lest the definition be not broad enough. The Supreme Court names many elements that help determine what is a reasonable rate, but clearly says there may be others.[5]

[3] Stone *v.* Farmers L. & T. Co., 116 U. S. 307, 331 (1886).

[4] Chicago, M. & St. P. Ry. Co. *v.* Minnesota, 134 U. S. 418 (1890). This case, as correctly stated in the dissenting opinion, practically overruled Munn *v.* Illinois, and it established as a fixed principle of American jurisprudence that the courts might inquire into the reasonableness of legislative reductions of railroad rates. The state commission had ordered a reduction of rates, and the railroad company refused to obey, and the commission applied to the court for a *mandamus*. The Supreme Court of Minnesota sustained the commission, but the Supreme Court of the United States reversed that decision. The court held that the railroad should be given an opportunity to show that the reduced rate was unreasonable.

[5] Smyth *v.* Ames, 169 U. S. 466 (1898), where the court held (p. 540) that the "kind and amount of business and the cost thereof are factors which determine largely the question of rates." The court held that the payment of dividends and interest is subject to the rule that the fair value of the property and the fair value of the services rendered were to be considered, and also the right of the public to be exempt from unreasonable exactions, especially where the bonds may exceed the fair value or the

And, in fact, there is one other that has lately come to the front and now dominates the whole railroad situation. It is that the

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capitalization may be largely fictitious. The court said (p. 546) that the amount of compensation to which the railroad is entitled "and what are the necessary elements in such an inquiry, will always be an embarrassing question," but that the alleged basis of all such calculations "must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth" (pp. 546, 547). This whole subject of elements making up a reasonable rate is complicated by the difficulty of dividing railroad expenses incurred jointly for interstate and intrastate business, and also other charges common to both. In Broesbeck *v.* Duluth, etc. Ry., 250 U. S. 607 (1919), the court said (pp. 614, 615): "Fifth: The remaining objection relates to the formula adopted by the lower court for dividing charges and expenses common to freight and passenger services, and not capable of direct allocation. What method should be pursued in making such division is a very difficult problem, to which railroad accountants, the Interstate Commerce Commission and state railroad commissions have for years given serious attention. Despite much patient study and the exhibition of great ingenuity no wholly satisfactory method has yet been devised. The variables due to local conditions are numerous; and experience teaches us that it is much easier to reject formulas presented as being misleading than to find one apparently adequate. The science of railroad accounting is in this respect in process of development; and it may be long before a formula is devised which can be accepted as satisfactory. For the present, at least, the question what formula the trial court should adopt presents a question, not of law, but of fact; and we are clearly unable to say that the lower court erred in adopting the method there pursued."

The author of this article, in the seventh edition of his work on CORPORATIONS, volume 4, page 3614, said that "a reasonable rate is a rate which will sustain the credit of an established railroad, in a particular part of the country, and enable it to raise fresh capital to fulfill its public duties of good service, improvements, betterments, increased facilities and extensions." That was eight years ago, and that view apparently is now the general view of what the rates must be, irrespective of values, costs, depreciation, reproduction and all the other theories, which have given so much trouble and cost so much money. The railroads must be kept going.

I doubt the soundness of the theory that a reasonable rate may be different in a shipper's case from what it is in a confiscation case. The burden of proof may shift from the railroad, but in both cases the railroad is entitled to only a fair return. The shipper's case may be local and be decided on comparisons, etc., but fundamentally it would seem to be the same as a confiscation case. Even if the rate is based on the fair value of the property, without any margin for credit to obtain fresh money, this

rate must be high enough to give profit enough to make safe for investors the investment of a billion dollars a year in railroad stocks and bonds — fresh money for railroad extensions and improvements. Congress had that element of a reasonable rate in view when in 1920 it enacted that the rates must include consideration of enlargement of railroad facilities, and, in fact, might include one half of one per cent of the value of the railroad, "for improvements, betterments or equipment."[6] All this adds to the complexity of the question of what is a reasonable rate, and yet, strange to say, by reason of this new element, namely, the practical insolvency of many of the railroads, litigation on the whole subject of rates will now probably decrease, so far as railroads are concerned, although it may continue as to street railways, gas, electric light, waterworks and other quasi-public utilities, which are not insolvent.

Railroad rate reductions are due to three sources: (1) Congress; (2) state legislatures and state commissions; (3) the Interstate Commerce Commission, representing Congress.

I

CONGRESS

Congress has rarely reduced rates directly,[7] but does so through the Interstate Commerce Commission. But Congress increased railroad wages in 1916,[8] and the effect was the same as reducing rates. Congress did this to avert a strike; and the Supreme Court sustained the Act, but pointed out that it was not confiscatory in

applies equally to a shipper's complaint, and, in fact, the legislatures represent the shippers in legislating a reduction.

[6] Interstate Commerce Act, § 15, a (3) and (4), as amended February 28, 1920.

[7] The case Atlantic, etc. R.R. Co. *v.* United States, 76 Fed. 186 (1896), upheld an Act of Congress reducing rates charged by a land-grant railroad (chartered by Congress July 27, 1866) for the transportation of government troops, etc., there being no showing as to the railroad expenses and receipts for an adequate period. In the case United States *v.* Louisville etc. Canal Co., 4 Dill. (U. S.) 601 (1873), per Miller, J., sitting at circuit, it was held that although the United States government owns all the stock of a canal company, yet, if there is a mortgage on the property, Congress cannot reduce the tolls to a point where the mortgage is affected. "It is a legislative attempt to destroy vested rights, and a taking of private property for public use without due compensation" (p. 611). In England there is no constitutional provision protecting bondholders against an Act of Parliament affecting the bonds. See Brown *v.* Mayor, etc. of London, 9 C. B. (N. S.) 726 (1861).

[8] Section 3 of "An Act to establish an eight-hour day for employees of carriers engaged in interstate and foreign commerce. and for other purposes" (Act of Sept. 3, 5, 1916; 39 STAT. AT L., pp. 721, 722) reads as follows:

its effects.[9] Congress in 1920 ordered an increase in rates so as to net at least five and one half per cent on the value of the railroads.[10] Congress, on the other hand, in 1913, in response to a public belief that the railroads were over-capitalized, passed an Act that their value should be ascertained by the Commission.[11] The Act did not state whether it was to ascertain that value as a basis for railroad rates or for condemnation proceedings. It is true that the Commission had recommended that such valuation be made, but Congress ignored that recommendation until public opinion demanded a valuation, evidently in the belief that it would demonstrate that the railroads had watered stock and bonds, not representing real value.[12] The Commission has been laboring with that proposition ever since and is now about to report. The indications are that the report will show that the railroads are not over-

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"Sec. 3: That pending the report of the commission herein provided for and for a period of thirty days thereafter the compensation of railway employees subject to this Act for a standard eight-hour work-day shall not be reduced below the present standard day's wage, and for all necessary time in excess of eight hours such employees shall be paid at a rate not less than the pro rata rate for such standard eight-hour work-day."

Dean Bates of the University of Michigan Law School well said in an address before the Texas Bar Association in July, 1921, in regard to this Adamson Act, that it "has opened a Pandora's box and released a swarm, which probably neither God nor the devil has been able yet fully to appraise."

[9] Wilson *v.* New, 243 U. S. 332 (1917). In a later decision, Ft. Smith & W. R. R. Co. *v.* Mills, 253 U. S. 206 (1920), the court held that this Act, although by its general terms purporting to apply to all railroads and railroad employees subject to the Act to Regulate Commerce, was not intended to govern the exceptional case of an insolvent railroad operating at a loss under an agreement with its men, which they desired to keep, allowing them less wages than the act prescribed. See also Birmingham T. & Sav. Co. *v.* Atlanta, etc. Ry. Co., 271 Fed. 731 (1921).

[10] The Transportation Act of February 28, 1920.

[11] Act of March 1, 1913; 37 U. S. STAT. AT L. 701.

The Commission held that it could not comply with the Act, but the Supreme Court held that it must do so. United States *v.* I. C. C., 252 U. S. 178 (1920).

[12] It is a curious fact that although the public has for forty years vociferously denounced and legislated against watered stock, yet now the legislatures of the different states are passing laws authorizing the issue of stock with no par value. The claim is made that this will obviate frauds. The obvious answer to that is that if stock *with* par value represents property of that value there is no fraud, while with stock of no par value the real value of the property received in payment is concealed, and this encourages fraud indeed, because the penalty, *i.e.* the liability by statute or common law, is removed. The public knows the value of merchandise but not of stock, and hence is easily defrauded. The writer published an article on this subject in 19 MICHIGAN L. REV. 583 (April, 1921).

capitalized, but on the contrary are under-capitalized. This is due largely to the fact that in 1913 (the same year as the Valuation Act, but a few months later in that year), the Supreme Court held in the Minnesota Rate Cases [13] that the present value of railroad lands, terminals and rights of way should be taken as a basis, and not the original cost of those terminals, rights of way and land. These, of course, have increased enormously in value as compared with their original cost fifty or more years ago. In other words, Congress seems to have brought forth a legal basis for even higher rates than we have now. It is true that the Supreme Court has held that enormous increases in value will not be allowed to be the basis of an unfair public rate;[14] but the high values of these terminals and rights of way can hardly be attacked, inasmuch as enormous sums of money have been lost as well as made in railroads,[15] and, moreover, present values are represented by securities in the hands

[13] Simpson *v.* Shepard, 230 U. S. 352, 454 (1913), where the court said: "It is clear that in ascertaining the present value we are not limited to the consideration of the amount of the actual investment. If that has been reckless or improvident, losses may be sustained which the community does not underwrite. As the company may not be protected in its actual investment if the value of its property be plainly less, so the making of a just return for the use of the property involves the recognition of its fair value if it be more than its cost. The property is held in private ownership, and it is that property, and not the original cost of it, of which the owner may not be deprived without due process of law." See also Denver *v.* Denver Union Water Co., 246 U. S. 178 (1918).

Professor Goddard of the University of Michigan Law School, in the MICHIGAN LAW REVIEW for June, 1921 (vol. 19, p. 849), gives a valuable synopsis of the decisions to the effect that the courts, in passing on rate questions, depend chiefly on reproductive cost, while the commissions are impatient with this and rely largely on other elements, especially original cost if ascertainable.

[14] In this same Minnesota Rate Case, 230 U. S. 352, 454 (1913), the court said: "But still it is property employed in a public calling, subject to governmental regulation, and while under the guise of such regulation it may not be confiscated, it is equally true that there is attached to its use the condition that charges to the public shall not be unreasonable."

And in the previous case, Willcox *v.* Consolidated Gas Co., 212 U. S. 19, 52 (1909), the court said: "If the property, which legally enters into the consideration of the question of rates, has increased in value since it was acquired, the company is entitled to the benefit of such increase. This is, at any rate, the general rule. We do not say there may not possibly be an exception to it, where the property may have increased so enormously in value as to render a rate permitting a reasonable return upon such increased value unjust to the public."

[15] The fact is that most American railroads were built ahead of population and the original investment was largely lost. Subsequent successes are talked about, but original losses are forgotten. The hits are history; the misses are mystery.

of investors, and certainly present railroad rates (which even now are not high enough to pay an income on these securities) will apparently have to be borne by the public, although burdensome. On the whole, Congress has not been particularly friendly to the railroads. Even its charity in 1920, limited to six per cent, had an air of condescension towards a poor relative, and merely served to keep the wolf a little farther away from the door. Congress will now have to choose some other plan, because the public will not tolerate any further increase in rates, and in fact is insistently demanding lower rates.

II

State Legislatures and State Commissions

These have caused a great deal of trouble. Our dual system of government, excellent though it is, has its drawbacks, and the separate sovereignty of the states has been a prolific source of discord on the railroad question. The Granger decisions in 1876 made the states supreme on the question of rates, Congress not having acted; but, as mentioned above, the Wabash decision in 1886 cut out most of the trouble in confining state activities to intrastate rates.[16] Then came the Shreveport decision, in 1914, that the Interstate Commerce Commission, representing the federal government, could override state statutes and state commissions where intrastate rates, as fixed by them, interfered with reasonable interstate rates as fixed by that commission.[17] That principle has now been applied by the Commission in increasing intrastate rates so that they correspond more closely to the seventy-two per cent increase in interstate rates.[18] Once more the question has gone to the Supreme Court, and its decision may settle the question once for all, so that a harmonious system of rates may at

[16] Wabash, etc. Ry. Co. *v.* Illinois, 118 U. S. 557 (1886).

[17] Where a state commission has reduced the intrastate rate of a railroad so as to discriminate in favor of points within the state as against points outside of the state, the Interstate Commerce Commission may order that railroad to abolish the discrimination by lowering its interstate rate, or by partly lowering its interstate rate and partly raising its intrastate rate, or by raising the intrastate rate alone. Houston, etc. Ry. *v.* United States, 234 U. S. 342 (1914). See also American Express Co. *v.* Caldwell, 244 U. S. 617 (1917), and Illinois Central R. R. Co. *v.* Public Utilities Com., 245 U. S. 493 (1918).

[18] The decisions of the lower court are reported in Lehigh Valley R. R. Co. *v.* Public Ser. Com., 272 Fed. 758 (1921), and City of New York *v.* United States, 272 Fed. 768 (1921).

length be possible. The monetary importance of these intrastate rates is not so great as is generally supposed, inasmuch as railroad receipts from these are small as compared with those from interstate business. The state commissions have made a noise on this subject out of all proportion.

III

The Interstate Commerce Commission

This has been the chief storm center of litigation during the past fifteen years. The Interstate Commerce Act was enacted in 1887. It was based in part at least on the English Act of 1845,[19] which was the first English statute regulating railroads. The English Commission works very well, but it has no state legislatures or state commissions, claiming independent jurisdiction, to deal with. The American Commission has had a stormy time indeed. It claimed the power to reduce rates from the beginning, but the Supreme Court ten years later held that it had no such power.[20] For ten years more this was the situation, and then in 1906 Congress gave that power to the Commission. Immediately reductions of rates by the Commission began; but it was on the retail plan, instead of the wholesale plan of the states. The Commission dealt and still deals with specific complaints as to certain shipments or between certain points. It, of course, obeyed the order of Congress in 1920, increasing rates generally, but its function is to deal with rates piecemeal. In so doing it has relieved the courts of a great mass of litigation, because in 1907 the Supreme Court held that a shipper complaining of the unreasonableness of a rate must complain first to the Commission instead of suing in a court,[21] and only after the Commission has made a ruling is he entitled to sue in the courts for violation of such ruling.[22] And there is a further

[19] Railway Clauses Consolidation Act of 1845, 8 & 9 Vict., c. 20. See statement as to this in Texas & Pacific Ry. Co. *v.* I. C. C., 162 U. S. 197, 222 (1896).

[20] Cincinnati, New Orleans, etc. Ry. *v.* I. C. C., 162 U. S. 184 (1896); I. C. C. *v.* Cincinnati, New Orleans, etc. Ry., 167 U. S. 479 (1897).

[21] Texas, etc. Ry. *v.* Abilene, etc. Co., 204 U. S. 426 (1907); Southern Ry. Co. *v.* Tift, 206 U. S. 428 (1907); Baltimore & Ohio R. R. Co. *v.* United States, 215 U. S. 481 (1910); Director General *v.* Viscose Co., 254 U. S. 498 (1921).

[22] The Interstate Commerce Commission has exclusive jurisdiction as to the reasonableness and non-discriminatoriness of a railroad company's rule in the distribution of cars, but for a violation of that rule by the railroad company itself the shipper may sue for damages in either the state or federal courts. A state court has

check on such litigation. The rulings of the Commission, like the verdict of a jury, cannot be set aside by the courts, except for errors of law.[23] The result of all this is that few cases now reach the Supreme Court involving reduction of rates by the Commission. From January 1, 1915, to 1921, only twelve such cases appear in the reports,[24] and only sixteen involved reductions by state legislatures or state commissions, while none at all involved reductions by Congress.

jurisdiction of a suit for damages against a carrier for failure to deliver cars in accordance with its own rule, where the rule is not attacked but discrimination and violation of the rule is charged. Illinois Central R. R. *v.* Mulberry Coal Co., 238 U. S. 275 (1915). Suit does not lie to attack a rule of a carrier as being unfair or discriminatory as against one class of interstate shippers in favor of another, the Interstate Commerce Commission having exclusive jurisdiction as to that, but after the Commission has declared the rule unjust, redress may be before the Commission or in the United States courts. If, however, the rule is fair on its face but has been unequally applied, a suit for damages therefor may be brought in either the state or federal court. Pennsylvania R. R. *v.* Puritan Coal Co., 237 U. S. 121, 131 (1915). A shipper's claim to be reimbursed for expense for placing inside doors on cars on an interstate shipment may be sustained in the state court as to intrastate shipments under the New York statute (Loomis *v.* Lehigh Valley R. R., 208 N. Y. 312, 101 N. E. 907 — 1913), but not in the federal courts as to interstate shipments until after the Interstate Commerce Commission has passed upon the matter. Loomis *v.* Lehigh Valley R. R., 240 U. S. 43 (1916). If no administrative question is involved, a claim for damages for failure, upon reasonable request, to furnish to a shipper in interstate commerce cars sufficient to meet his needs may be enforced in a state as well as a federal court, and without preliminary finding by the Interstate Commerce Commission. Pennsylvania Railroad Co. *v.* Sonman Shaft Coal Co., 242 U. S. 120 (1916). A state court has jurisdiction of a suit involving unlawful interstate discrimination where the administrative power and discretion of the Interstate Commerce Commission is not involved and where the jurisdiction of the federal courts is not exclusive. The Commission has exclusive jurisdiction if a rule is unfair on its face, but if the carrier has no rule or regulation on the subject a state court may have jurisdiction. Langhill *v.* Pennsylvania R. R., 254 Pa. St. 119, 98 Atl. 873 (1916).

[23] Illinois Central R. R. Co. *v.* I. C. C., 206 U. S. 441 (1907); Seaboard Air Line Ry. Co. *v.* United States, 254 U. S. 57 (1920). In the case I. C. C. *v.* Union Pacific R. R. Co., 222 U. S. 541 (1912), the court held that the orders of the Commission cannot be set aside by the courts unless beyond the constitutional or statutory power of the Commission, or were based upon a mistake of law, or were confiscatory, or were without evidence or contrary to the evidence, or were palpably unreasonable. To the same effect, see I. C. C. *v.* Louisville & N. R. R. Co., 227 U. S. 88 (1913), and Florida E. C. Ry. Co. *v.* United States, 234 U. S. 167 (1914), where there was no evidence to sustain the ruling. In the case Manufacturers Ry. Co. *v.* United States, 246 U. S. 457 (1918), the court ruled, as stated in the syllabus, that where the Commission, after full hearing, sets aside a rate as unreasonably high, only a clear case would justify a court, upon evidence newly adduced but not newly discovered, in annulling the Commission's action upon the ground that the same rate was so unreasonably low as to deprive the carrier of its constitutional right of compensation.

[24] In addition some nineteen decisions involved discriminations.

The litigation phase of the whole subject is passing into the economic phase, with Congress as the storm center. The legal battle has become merged into the economic battle between railroad insolvency and trade necessity.

The Supreme Court has certainly done its work well. It was confronted with one of the most difficult, complicated questions in the history of jurisprudence, and it has brought order out of chaos. The power of that Court to declare unconstitutional and void the acts of states, municipalities, commissions, and even of Congress and the Executive itself — a power which has made it the greatest court that ever existed, and enables it to safeguard the rights of all — has been invoked often and earnestly in these rate reduction cases, and its decisions *pro* and *con*, conscientiously considered and learnedly expressed, have commanded the absolute confidence of the people.

Now let us approach the subject from another standpoint. Congress and the state legislatures and the Interstate Commerce Commission and the state commissions are all affected and at times controlled by the great economic forces that control the industrial life of the nation. Formerly, railroad capitalists, such as Vanderbilt and Huntington, and railroad bankers and reorganizers, had much to say, but their power has declined. They fought for themselves, their bondholders and stockholders. Sometimes they warred among themselves. Their wars of competition reduced railroad rates to the lowest in the world.[25] They gave good service, better than any government could or would give. They prospered, however, and although they earned what they got in comparison with what they did, yet the public resented their attitude and actions. They became a great money power and a menace to the country. Capital has learned, just as union labor has learned, that no class will be allowed to dominate this country.

But there is another great economic force that has not declined, namely, the trade necessity for low rates for the farmer, the manufacturer, the miner and the shipper generally. Their power will

[25] Judge Cooley in his opinion *In re* Chicago, St. Paul, etc. Ry. Co., 2 I. C. C. 231, 261 (1888), holding that the Commission could not stop railroad wars of rates, pointed out that these reckless carriers by giving ruinously low rates were "giving the public to understand that those rates are reasonable and remunerative," and were establishing as against themselves a low standard of rates for all time. His ruling was approved in the Maximum Rate Cases, 167 U. S. 479 (1897).

prevail. When in 1886 the Supreme Court held that a state legislature could reduce intrastate rates, but not interstate rates, the latter being exclusively controlled by Congress,[26] Congress immediately in the following year enacted the Interstate Commerce Act.[27] As originally enacted, as stated above, that Act did not give the Commission much if any control over rates. In 1906, however, Congress, impelled by the pressure of public opinion, gave the Commission almost unlimited power over rates.[28] And the Commission was not chary in the use of that power. It refused to allow an increase in rates in 1911.[29] Even in 1917 it refused to allow a fifteen per cent increase.[30] Then came McAdoo and War Control and the rates were put up thirty-three per cent on freight and twenty per cent on passengers. But McAdoo put up the expenses faster than he did the rates, especially the labor expense. The result was that when the Government turned back the railroads to the railroad companies, in 1920, bankruptcy stared them in the face. One government commission controlled their income, while another government commission controlled their labor bill, without the Government being responsible in the slightest. The absurdity of the situation is without a parallel in industrial or governmental history, and of course it cannot last. It is worse than the ship-owning proposition, because there at least the Government pays the deficit. The American fad that all railroad troubles can be shifted to a commission will go the way of all fads. Irresponsible commission rule — irresponsible in the sense that the Government avoids all financial responsibility — will be displaced by some plan, under which the Government will pay the bills, if it makes the rates too low or the expenses too high.[31] Even the

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[26] Wabash, etc. Ry. Co. *v.* Illinois, 118 U. S. 557 (1886).

[27] Act of February 4, 1887, 24 STAT. AT L. 379.

[28] Act of June 29, 1906, 34 STAT. AT L. 584.

[29] 20 I. C. C. 243, 307 (1911).

[30] The Fifteen per cent Case, 45 I. C. C. 303 (1917).

[31] Theoretically and originally a commission was supposed to be administrative in its character, but in these latter days it has become quasi-legislative, quasi-executive and quasi-judicial; in fact, in Arizona it is declared to be practically a fourth department of the government itself. State *v.* Tucson, etc. Co., 15 Ariz. 294, 138 Pac. 781 (1914). Those who are interested in the legal status of commissions and the justification for the delegation of powers to them, notwithstanding the written constitutions and jurisprudence of America, will find the subject treated in Honolulu R. T. Co. *v.* Hawaii, 211 U. S. 282 (1908); Grand Trunk Ry. *v.* Michigan R. R. Comm., 231 U. S. 457 (1913); Trustees, etc. *v.* Saratoga Gas, etc. Co., 191 N. Y. 123, 83 N. E. 693 (1908);

states may conclude that, having lost control over intrastate rates, it is better to have responsible federal railroad corporations to deal with than irresponsible federal commissions.

Meantime a complete realignment of forces is going on. The bankers and investors are tightening their purse strings and refuse to buy any more railroad securities, thus cutting off the commissary department. The shippers and legislatures have temporarily acquiesced in an increase in rates, but are belligerent. Congress in February, 1920, ordered the Commission to increase rates, so as to pay at least five and one-half per cent on the value of the railroads,[32] and in July, 1920, the Commission raised freight rates about thirty four and five-tenths per cent above the McAdoo rates, making the entire increase about seventy-two per cent on freight.[33] The prospects of a general decrease in rates is dim and distant indeed. The railroads find that even the above increase is not enough to pay interest and dividends and raise fresh money, and yet fresh money they must have. On the other hand, the shippers are rising in their wrath that the rates are so high. International and interstate trade is declining and prices are going down. The farmer is handicapped by the high freight rates. They take too much of the price at which his products are finally sold.[34] The demand is becoming insistent that rates be reduced. The railroads are vaguely promising better

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Bessette *v.* Goddard, 87 Vt. 77, 88 Atl. 1 (1913); State *v.* Baltimore & Ohio R. R. 76 W. Va. 399, 85 S. E. 714 (1915). Compare State *v.* Great Northern Ry., 100 Minn. 445; 111 N. W. 289 (1907).

JUDSON, INTERSTATE COMMERCE, 3 ed. § 53 (p.100), in speaking of commission rule says, "We are thus compelled to revise our time-honored conception of the distribution of the powers of government, as we have not only executive, legislative and judicial departments, but also the department of administration, distinct from, and yet to a degree exercising the functions, which have been deemed appropriate to each of the others." Mr. Judson points out that the Interstate Commerce Commission exercises legislative, executive and judicial powers.

If, as many expect, the national, state and municipal governments ultimately acquire all public utilities, these "fourth departments" would disappear.

[32] Act of February 28, 1920, 41 STAT. AT L. 488.

[33] FEDERAL RESERVE BULLETIN, May, 1921, p. 135 (final edition, p. 507).

[34] The FEDERAL RESERVE BULLETIN for May, 1921, says (p. 136) (final edition, p. 508): "The result of existing conditions in the railroad rate structure is twofold (1) railroad charges and costs are at present retained upon a basis which has undergone no readjustment such as has occurred in other branches of industry, so that they exact too large a proportion of the selling price of commodities, while (2) the lack of satisfactory adaptation of the rates to the various types of freight has resulted in preventing the movement of some classes of commodities to competitive markets."

things. Congress is vaguely intimating that government aid will again become necessary and vaguely intimating that that means government ownership. All this is alarming to conservative minds. Vice-President Coolidge, in an interview June 1, 1921, said:

"No one can say where the tremendous sum of money necessary for the purchase of the railroads, the equivalent of our war debt, could be secured. Certainly it would not result in any less charge for capital than is now paid. The saving in taxes would be merely a shifting of the burden, and it does not appear from experience that other operating expenses would be less. So I do not see that government ownership offers an easy avenue of escape.

"The nation has not liked, and would not like, being taxed for the direct maintenance of transportation. Some solution must be found in the reduction of expenses, for it is obvious that there can be no increase in rates. In fact, the demand is all for a decrease."

The brilliant representative of the railroad presidents, Mr. Kruttschnitt, at a hearing before the Senate Committee on Interstate Commerce, on May 10, 1921, on the railroad problem, said that great economies could be made by

(1) Charging tolls to common carriers using the highways.
(2) Charging tolls to common carriers using the inland water-ways.
(3) Stopping public aid to water competition with railroads, such as the Panama Canal in competition with the transcontinental railroads.

All this involves a great fact — misapplied. The public certainly is expending hundreds of millions of dollars annually on highways that give free roadbed to motor trucks carrying freight; hundreds of millions on waterways used without charge by steamboats; and has spent hundreds of millions on the Panama Canal with little or no income. But would Mr. Kruttschnitt raise the price of commodities by charging for the use of highways and waterways in order that traffic may be driven to the railroads? That is a startling proposition. He might better have said:

"The Government gives cheap transportation facilities on highways and waterways, by furnishing free that which corresponds to a railroad roadbed. Why should not the Government aid the railroads by assisting in their finances? Is water and highway transportation more important or more entitled to public assistance than railroad transportation? If public funds and credit are used for the one, why not for the other?"

Of course Mr. Kruttschnitt did not say this, inasmuch as the railroad presidents know that government aid means government control, much the same as the present control over highways and waterways by the national, state and municipal governments. But there certainly is no reason why the Government should aid waterways and highways and yet refuse aid to that bankrupt institution, the railroad system of the United States. The living, pressing question is, not whether aid shall be given (the situation compels that), but how shall it be given and how shall the national control be exercised?

The Interstate Commerce Commission to-day is Congress, so far as railroad rates are concerned, and the Commission responds to the pulsations of public sentiment, the same as Congress. The Commission is in control, but is not responsible for results. This is power without responsibility, and cannot last. The railroad managers are helpless. The investor will not invest. The railroads cannot add to their facilities, and yet the country is growing all the time. The public is willing to vote hundreds of millions for highways, but is unwilling to vote anything further for the railroads. This is on account of private control.

One way out is the application of the principle of the Federal Reserve Banking System to the railroads. This can be done by Congress incorporating federal railroad corporations for districts, into which the whole country could be divided, and then providing for a Federal Railroad Board to control those federal railroad corporations. Senator Lenroot, in a bill introduced by him in the Senate, provided for but one such federal railroad corporation to cover the whole country, but the vastness and diversity of this country, and the suspicions, jealousies and hostilities that would attend one centralized federal railroad corporation, controlling all the railroads of the country, will probably prevent any such plan being adopted.

And the millennium would not dawn even if a Federal Railroad Board controlled all the railroads by means of subsidiary federal railroad corporations. Rates would not be much lower and service would not be better. But at least the money would be forthcoming to make this national transportation system what it should be. That is the crucial point. The country will wait to see what the railroads can do with the present situation, but if they fail, as fail

they probably will, the present system of control will be swept aside as incompetent and outgrown. It will not be sufficient for the railroads to earn just enough to pay present dividends and interest. They must earn enough surplus to win back the confidence of investors, in order to sell new stock and bonds to the amount of a billion dollars a year. The billion must be had, and if the railroads cannot command it without a government guaranty, that guaranty must be given. With that guaranty will go a new system of control.[35]

This plan is not government ownership. The Government would not own any of the property, either stocks, bonds or the railroads themselves.[36] The Government would merely name the Federal Railroad Board and guarantee the dividends. The Federal Railroad Board, appointed by the President and confirmed by the Senate, would be governmental in its origin, but not governmental in its work. Neither capital nor labor nor the present railroad management nor the farmer nor the commercial classes should, as such, be given representation on that Federal Railroad Board. Members, of course, would be chosen from those classes, but when they became members they would cease to represent any class, just as the President of the United States represents no class, but all classes. That Board *would* have complete control of all of the railroads. It could select, employ and discharge at will, directly or indirectly, any railroad general manager in the United States. It would have complete and absolute control over receipts and expenditures, the same as the old railroad kings used to have. There would be no divided responsibility, no delayed decisions. It would be a unified power and would be workable and logical in

[35] On June 30, 1921, a representative of the Interstate Commerce Commission proposed to the Senate Committee on Interstate Commerce that Congress incorporate a company, the entire capital stock to be owned by the government, to buy and sell railroad securities, to loan moneys to the railroads, and to buy equipment and lease or sell it to the railroads, subject always to the approval of the Commission. As an opening wedge this comes pretty close to the plan outlined above. Its weak feature is that it does not carry real control of the railroads.

[36] Government ownership is thoroughly discredited in this country at present, on account of war experiences, resulting in a loss of about one and a half billion dollars to say nothing of the bad service. Yet the American Federation of Labor, at its annual convention, held in Montreal, voted on June 17, 1920, by 29,059 to 8,349, that the American Government should own the railroads and exercise "democratic management." This position was reaffirmed in 1921.

its structure. At present the country is disgusted with guaranties, and naturally so in view of recent experiences; but if Congress is to control rates with one commission and the labor bill with another commission, Congress must guarantee results to the investor; and on the other hand, if the investor is to be guaranteed results he must give up the control — such little control as he has. On that file the present situation will break its teeth.

The legal side of this proposition is attractive. Federal corporations, owning the railroads, need not be subject to state laws. Two cent laws, full crew laws and other choice assortments of state laws would exist only by the lethargy of Congress. States could then regulate railroads only by the implied or express consent of Congress, and state regulation would be reasonable and useful if permissive instead of under claim of right. Congress incorporated several railroad corporations during or soon after the Civil War,[37] and while they are now practically extinct, the decisions as to their status in regard to the states show that federal incorporation is the short and effective way to relieve the railroads from the pernicious activity of state legislatures and state commissions.[38]

[37] The first one was that of the Union Pacific granted July 1, 1862. 12 STAT. AT L. 489. In 1864 Congress chartered the Northern Pacific R. R. Co., and authorized it to build a railway line from a point in Minnesota or Wisconsin to Puget Sound. 13 STAT. AT L. 365. In 1866 Congress chartered the Atlantic & Pacific R. R. Co. to construct a railroad from a point in Missouri to the Pacific Ocean. 14 STAT. AT L. 292. In 1871 Congress chartered the Texas Pacific Railroad to construct a railroad in California and Texas. 16 STAT. AT L. 573.

[38] Mr. Justice Brewer, sitting at Circuit in the case Ames *v.* Union Pacific R. Co., 64 Fed. 165 (1895), said, p. 170, as to the Reagan case, 154 U. S. 413 (1894), in the decision of which he wrote the opinion:

"It is insisted that the Union Pacific Railway Company cannot be subjected to the provisions of this statute, because it is a corporation created by Congress, and as such, in the discharge of any of its functions, is subject only to the control of that body. The general question of the power of a state in respect to rates for local freight over a corporation organized under the laws of Congress was considered in 154 U. S. 413, and it was there held that the mere fact that the corporation was so organized did not exempt it from state control in that respect. *It was conceded in the opinion in that case that Congress could wholly remove such a corporation from State control;* but it was held that, in the absence of something in the statutes indicating an intention on the part of Congress to so remove it, the state had the power to prescribe the rates for all local business carried by it. Of course, that decision is controlling." Italics are mine.

In this same case on appeal, Smyth *v.* Ames, 169 U. S. 466 (1898), the Supreme Court took practically the same view on pages 521, 522. See also the quotation in Bankers Trust Co. *v.* Texas & Pac. Ry., 241 U. S. 295, 305 (1916).

There is also an economic side to the proposition, which is equally attractive. On January 1, 1920, the par value of all railroad stocks and bonds was $19,576,000,000, consisting of $10,684,000,000 funded debt and $8,982,000,000 stock.[39] Of this stock, however, $4,330,493,806 is held by the railroads themselves.[40] This reduces the $19,576,000,000 to $15,245,506,194. The market price of these securities is on the average far below par. This would reduce the $15,245,506,194 that much more. On the other hand, the indications are that the physical valuation of the railroads will show a value of over $19,576,000,000. Hence a plan by which government guaranteed stock be issued in exchange for these bonds and stock at their fair value would be an attractive proposition and would not require any cash. It would be like the Government accepting $10,000,000,000 foreign government bonds, and then exchanging those bonds, with a guaranty, for this government's outstanding bonds to that amount. If the American people can obtain full and permanent control of about twenty billion dollars value of transportation facilities by guaranteeing a moderate income on something over ten billions of federal corporation stock, this is an opportunity, especially as it would substitute real control for present pseudo control, and avert railroad bankruptcy.

There are those who argue that government control, through a Federal Railroad Board, is trusting too much to voters. But that would be no more than we are now doing by exercising government control through the Interstate Commerce Commission and the Labor Board. Moreover, this lack of faith in the plain people is not justified. He who studies carefully the history of this country will find that in every great national emergency and on every great national question, the intuitions and instincts of the plain people have found the right way; and where they had no leader they produced one out of obscurity, such as Lincoln, and when diplomacy failed they marched to battle. The American people want transportation at cost and they are determined to have it.

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[39] INTERSTATE COMMERCE COMMISSION, 34th Annual Report, p. 100, for the year ended October 31, 1920.

[40] STATISTICS OF RAILWAYS IN THE UNITED STATES, 32d Annual Report for year ended 1918, p. 34.